Supreme Court, U.S.
FILED
NOV 14 2005
OFFICE OF THE CLERK

No. 04-1581

IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF ALLIANCE FOR JUSTICE, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

RUTH EISENBERG *
JOHN POMERANZ
HARMON, CURRAN, SPIELBERG & EISENBERG, LLP
1726 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-3500

B. HOLLY SCHADLER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009
(202) 328-1666

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF ALLIANCE FOR JUSTICE, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS*

Amicus Alliance for Justice is a national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations.[1] These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to the public policymaking process. Alliance for Justice and most of its members are charitable organizations that are exempt from federal income tax under

[1] Counsel for each party has consented to the filing of this brief. No counsel for a party authored this brief, in whole or in part. No person or entity other than *Amicus* made a monetary contribution to the preparation or submission of this brief.

Section 501(c)(3) of the Internal Revenue Code ("IRC"). A significant number of these members also work with or are affiliated with other types of nonprofit organizations that promote their views not only through public education and advocacy on public policy issues but also in the electoral process.

On matters of public policy, Alliance for Justice consistently takes positions that sharply contrast with Appellant in this case, and Alliance for Justice has itself produced broadcast advertisements supporting the important role of the Senate in considering the President's nominees to the federal bench. Despite differences on public policy issues, Alliance for Justice shares with Appellant the position that each organization has a First Amendment right to vigorously put its views on public policy matters before the public.

That belief in the intrinsic value of unfettered public debate in the public policy arena is central to Alliance for Justice's mission. Alliance for Justice works to increase the involvement of all types of tax-exempt organizations in the policy-making process by helping them understand and comply with sometimes complex federal tax and election laws governing these activities. Alliance for Justice supports nonprofit advocacy through plain language guides to the laws governing nonprofit advocacy, workshops for nonprofit organizations, and individualized technical assistance. Alliance for Justice also monitors legislative and regulatory activity, providing information to the nonprofit community and lobbying on proposed policy issues related to nonprofit advocacy.

During the congressional debate on the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81 ("BCRA"), Alliance for Justice expressed its concerns to BCRA's congressional sponsors and other members of Congress that the law's broadly drafted restrictions on "electioneering communications," BCRA § 203, 2 U.S.C. § 441b(b)(2),

would sweep in constitutionally protected speech.[2] However, Alliance for Justice did not seek to participate in the facial challenge to these provisions of BCRA, *McConnell v. FEC*, 540 U.S. 93 (2003), in part because the communications Alliance for Justice sought to protect were not squarely before the Court. Alliance for Justice submits this brief because the Court is now presented with speech that BCRA may not regulate consistent with the First Amendment because there is no compelling governmental interest that justifies the regulation. *Amicus* urges the Court to rule that such speech may not be restricted under the Constitution and to set out clear standards to protect the speech of independent organizations.

SUMMARY OF ARGUMENT

Under the strict scrutiny with which this Court examines restrictions on speech, this Court may only uphold a law as applied to particular communications to the degree that the government can demonstrate the restriction is necessary to achieve a compelling governmental interest. This Court has found that the threat of corruption to the political process justifies such restrictions as applied to some speakers and some communications, but the Court has also exercised its authority to construe narrowly statutes to protect speakers or speech that does not pose that risk.

In examining the broadcast communications that might fall within BCRA's technical definitions of electioneering communications and are similar to the ads challenged in this case,

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[2] Specifically, this section of BCRA prohibited corporations or unions from using general treasury funds to pay for "electioneering communications," which were defined at Section 201 as certain broadcast communications identifying a candidate for federal office aired within 30 days of a primary election or nominating convention or 60 days of a general election. BCRA § 201, 2 U.S.C. § 434(f)(3). *Amicus* does not challenge as unconstitutional the application of the disclosure provisions imposed on electioneering communications at Section 201. BCRA § 201, 2 U.S.C. § 434(1)-(2).

it is clear that many organizations apparently subject to the law's limits on electioneering communications have a legitimate First Amendment desire and need to air those communications. However there is no showing that the government's compelling interest in preventing corruption justifies the application of BCRA's restrictions to those communications.

Amicus offers and discusses three independent classes of broadcast communications that BCRA may not constitutionally regulate because there is no compelling governmental interest to justify such regulation:

- BCRA's restrictions on broadcast communications may not be applied to broadcast communications funded solely by individuals and aired by organizations not formed primarily for commercial or economic purposes because the government may not constitutionally restrict individual expressive expenditures and the nature of the organizations demonstrates that the use of these funds accords with its donor's views.
- BCRA's restrictions on broadcast communications may not be applied to communications aired by organizations exempt from federal income tax under IRC Section 501(c)(3) because these organizations do not engage in the types of activities that might justify governmental restrictions on speech.
- BCRA's restrictions on broadcast communications may not be applied to communications funded solely by individuals and concerning a specific legislative or administrative policy proposal because of the special constitutional protections afforded both individual expression and speech concerning matters of public policy.

The narrow test proposed by Appellant, although sufficient to provide Appellant with relief, fails to adequately protect these types of broadcast communications. Instead, *Amicus*

respectfully urges the Court to provide a ruling that clearly permits protected speech that might otherwise be chilled and thus reduces the necessity for future as-applied challenges.

ARGUMENT

I. Election Laws That Restrict Speech Are Permitted Only To The Degree That The Threat Of Corruption To The Political Process Is Found To Be A Compelling Governmental Interest As Applied To The Communications In Question.

In considering attempts by the government to restrict speech through federal election laws, this Court exercises strict scrutiny, and any restrictions must be necessary to achieve a compelling governmental interest. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Although the Court has found that some election laws survive strict scrutiny under the First Amendment, the Court has limited statutes that would have restricted speech that does not threaten to corrupt the political process.

A. The Court had said that the threat of corruption of the political process justifies some restrictions on electoral speech by some corporations and unions.

This Court has focused on the risk of corruption of the political process as the justification for campaign finance laws restricting speech.

In *Buckley*, this Court upheld the statute's limit on political contributions based on the compelling interest of the need to "limit the actuality and appearance of corruption." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). The Court used the corruption rationale to uphold the statute's restrictions on campaign contributions but found that rationale insufficient to uphold the statute's expenditure limits where there was less "danger

that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S at 26-29; 39-52 (1976).[3]

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court described its rationale for holding that restrictions on corporate political spending were generally justified by the possibility of corruption through the legal advantages that permit business corporations to amass funds. Such restrictions were permitted, it stated, because of the need:

> to restrict "the influence of political war chests funneled through the corporate form"; to "eliminate the effect of aggregated wealth on federal elections"; to curb the political influence of "those who exercise control over large aggregations of capital"; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization."

It further noted that:

> Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of

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[3] Justice Stevens has been less persuaded by the Court's distinction between contributions and expenditures, finding that the danger of *quid pro quo* exists in both circumstances. See, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring). Justice Stevens would, however, draw the line between restricting lobbying on matters of public policy and attempts to influence elections for public office. *Id.* Under this approach as well, Appellant's communications should be spared from BCRA's electioneering communications restrictions, as discussed *infra* in Section V of this brief.

> a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

479 U.S. at 257-58 (citations omitted).

In upholding BCRA's electioneering restrictions against a facial challenge, the Court in *McConnell* relied on this same concern for avoiding corruption of the system. The *McConnell* Court cited its previous election-law decisions to uphold the "legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *McConnell*, 540 U.S. 93, 205 (quoting *Austin*, 494 U.S. at 660). [4]

B. This court has narrowly construed or partially invalidated statutes that are overbroad for their failure to demonstrate a compelling governmental interest in regulating constitutionally protected speech.

As reflected above, the Court's most extensive discussion of the threat that amassed corporate wealth poses to the political system was in its decision in *MCFL*. Yet *MCFL* ultimately found that the Constitution required the Court to limit the reach of the statute in question because it was overbroad as applied to Massachusetts Citizens for Life. Because of the nature of the organization, there was no threat that wealth amassed for commercial purposes would be

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[4] Even Appellee FEC acknowledges "the statute's anti-corruption purposes" and the "federal interest in preventing actual or apparent electoral corruption." Motion to Dismiss at 16, 18.

perverted to skew the political system. The Court was explicit:

> Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic market-place, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of "traditional corporatio[n] organized for economic gain" that has been the focus of regulation of corporate political activity. *MCFL*, 479 U.S. at 259 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985)).

For these reasons, the Court in *MCFL* exercised its judicial authority to create "a limiting construction or partial invalidation [to narrow the law and] remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Similarly, in *McConnell*, the Court limited the construction of BCRA's electioneering communications restrictions by exempting "*MCFL* organizations." *McConnell*, 540 U.S. at 211.[5]

As a result, the BCRA limitations on the broadcast communications featuring federal candidates that are at issue in this case can only survive if the government can show that these restrictions are necessary to prevent corruption of the political system.

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[5] This is not the only evidence that *McConnell* did not foreclose as-applied challenges to BCRA. Alliance for Justice concurs with Appellant's arguments that such as-applied challenges to BCRA are permitted and constitutionally necessary. Alliance for Justice understands that future as-applied challenges will arise, and *Amicus* encourages this Court to define other areas of constitutionally protected speech as organizations with concerns different than those of Appellant seek relief.

II. The Breadth Of BCRA's Definition Of Electioneering Communications Could Either Chill Or Lead To Future Legal Challenges In Support Of A Variety Of Broadcast Communications.

Appellant's challenge asks the degree to which Congress may constitutionally forbid corporations and unions from using their funds to broadcast at certain times messages featuring individuals who are federal candidates. This issue potentially arises in countless broadcast communications made by groups across the political spectrum to contribute to the public debate on social and policy issues. Absent a ruling from this Court setting forth the Constitutional parameters of acceptable regulation of these communications, numerous organizations will be faced with the choice of mounting their own as-applied challenges to BCRA or of foregoing protected speech because of the burdensome expense involved in bringing such challenges.

A. Representative examples of potential electioneering communications abound.

As set forth below, a variety of organizations have produced numerous examples of broadcast communications in which federal elected officials have been identified in some manner. None of these broadcasts violated BCRA's restrictions on electioneering communications because they appear to have aired either prior to the effective date of BCRA or outside of BCRA's blackout period for electioneering communications.[6] Each of these examples is an illustration of a broadcast communication that is not one of the so-called "sham issue ads" that BCRA sought to regulate, but BCRA

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[6] It has not been possible for *Amicus* to determine when or even whether every one of these broadcast messages actually aired, particularly the public service announcement ("PSAs") (see discussion below), although *Amicus* has no reason to doubt that most of them were broadcast and that they aired outside of BCRA-restricted blackout periods.

would nonetheless prohibit a corporation or union from running the communications during a blackout period.

Lobbying and Similar Public Policy Advocacy

- In 2002, Senator John McCain of Arizona, a chief sponsor of BCRA at the federal level, appeared in television advertisements produced by Arizona's Clean Elections Institute, a 501(c)(3) organization supporting Arizona's public financing system for state elections. *See* http://www.azclean.org/documents/PR-McCainPSA.pdf (press release describing the ad) (last visited November 8, 2005).[7] Arizona's public financing system had been adopted through a state referendum in 1998, and the McCain ads were designed to encourage Arizonans to support the program with voluntary contributions. Senator McCain was not up for reelection in 2002; however, he was facing the voters in 2004 when opponents of the Arizona public financing system tried to put a measure repealing the system on the ballot. A court decision prevented the measure from appearing on the ballot, *Clean Elections Institute, Inc. v. Brewer*, 99 P.3d 570 (Ariz. 2004), making unnecessary possible advertisements by Senator McCain in further support of the public financing system during the electioneering communications blackout period.
- In 2005, the organizations Focus on the Family Action and FRC Action (I.R.C. Section 501(c)(4) affiliates of the 501(c)(3) organizations Focus on the Family and the Family Research Council) ran radio advertisements in states represented by more than

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[7] For the convenience of the Court and the parties, *Amicus* has created and will maintain a web page offering hyperlinks to all URLs referenced in this brief at www.harmoncurran.com/WIRTL. An electronic copy of this brief will also be available on this website. Only information that has been filed with this Court and served on the parties to this case will appear on this page.

twenty moderate Republican and Democratic senators in an effort to stop the use of the filibuster as part of the Senate's consideration of a handful of nominees to the federal bench. *See* http://www.focusaction.org/activities/a0000069.cfm (describing and providing links to the radio ads as well as a coordinated print ad campaign) (last visited November 8, 2005). The Senators named in the ads were perceived by organizations on both sides of the issue as key votes in determining whether an effort to end such filibusters would succeed.

- In the spring of 2005, Alliance for Justice Action Campaign (the 501(c)(4) affiliate of *Amicus*) aired a television advertisement featuring Senator Harry Reid of Nevada decrying stated plans by some Senators to change Senate rules and prevent filibusters during consideration of judicial nominees.

- In 2005, as the House of Representatives considered legislation to permit drilling for oil in the Arctic Wildlife Refuge, Defenders of Wildlife, the Alaska Coalition of New Jersey, and the New Jersey Chapter of the Sierra Club ran television ads that were capable of being received by more than 50,000 people in the districts of each of the five specific members of Congress from New Jersey. [8] *See* http://www.save

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[8] BCRA's definition of electioneering communications requires that they be "targeted to the relevant electorate" which means, in turn, that they are capable of being "received by 50,000 or more persons" in the district or state the candidate seeks to represent. BCRA § 201, 2 U.S.C. § 434(f)(3)(C). There is no way to be certain whether all of the examples featured in this brief met this requirement. However, organizations producing such ads will almost certainly choose to distribute them where the spokesperson has greater recognition among viewers or listeners. Similarly, individual broadcasters deciding whether to air such ads may likewise be more motivated to run ads featuring the local member of Congress. Thus, it is likely that advertisements produced for a national audience will be heard or viewed by the requisite 50,000 people in the jurisdiction represented by the officeholder.

arcticrefuge.org/ads.html (links to the ads and coordinated print ads) (last visited November 8, 2005). The members of Congress featured were perceived as likely swing votes on the issue.

- Congressman Barney Frank of Massachusetts recorded a broadcast advertisement for the 501(c)(3) Family Pride Coalition in the Spring of 2005 that criticized U.S. Department of Education Secretary Margaret Spellings for threatening to cut funding for a PBS children's television show that featured the child of a lesbian couple. *See* http://www.familypride.org/site/apps/nl/content2.asp?c=bhKPI7PFImE&b=551485&ct=704195 (press release describing the ad) (last visited November 8, 2005).

Public Service Announcements

- Immediately after the attacks of September 11, 2001, Senator John McCain of Arizona recorded a PSA for the Arab American Institute (a 501(c)(4) organization) to encourage all Americans not to discriminate against Arab and Muslim Americans in response to the attacks. *See* http://www.aaiusa.org/PDF/Fall_01.pdf at 2 (newsletter article about the PSAs) and http://www.adcouncil.org/about/news_100101 (press release about the PSAs) (last visited November 8, 2005).

- Congressman Tim Bishop of New York recorded a PSA for the American Cancer Society (a 501(c)(3) organization) highlighting October as Breast Cancer Awareness Month. *See* http://wwwc.house.gov/timbishop/issues1.htm (Congressman Bishop's website featuring a link to the ad under the entry for October 27, 2005) (last visited November 10, 2005). Although it appears that the PSA was recorded to air in 2005, the ad is not scripted for a particular year and could well be aired in Congressman Bishop's district during October of 2006, a month before the 2006 congressional elections.

- Congressman Christopher Cox of California appeared in a PSA for the Alzheimer' Association of Orange County (a 501(c)(3) organization). *See* http://www.alzoc.org/home.asp?seltopic1=10&selcategory1=64 (Congressman Cox's website featuring a link to the ad) (last visited November 8, 2005).
- Senator Harry Reid of Nevada recorded a PSA for the National Campaign to Prevent Teen Pregnancy (a 501(c)(3) organization) to promote May 2002 as National Teen Pregnancy Prevention Month. *See* http://www.teenpregnancy.org/resources/reading/audiovisual.asp (Campaign website featuring link to Reid ad in listings for 2002) (last visited November 8, 2005).

Fundraising Efforts

- In 2004, the National Kidney Foundation (a 501(c)(3) organization) aired radio ads featuring Congressman Tom Davis promoting a charity golf tournament to raise funds for the Foundation. Congressman Davis sought and received an advisory opinion from the FEC permitting him to appear in these ads. FEC Advisory Op. 2004-14. The FEC relied on a regulation exempting unpaid advertising from the definition of "electioneering communications," a regulation that was subsequently struck down in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The FEC opinion had noted that ad would also have been exempt because it ran a week outside of the statutory time window.

B. It is likely that organizations will desire or seek to air similar broadcast advertisements during the electioneering communications blackout periods.

There is compelling evidence that organizations, including Appellant in this case, would wish and need to broadcast communications on matters of public or social policy that

identify a federal candidate, such as those in the examples above, within the statutory 30- and 60-day timeframes provided under BCRA.

It is particularly likely that broadcast communications for purposes of lobbying on legislative and administrative actions must air during the blackout periods in order to be effective. The blackout periods are frequently periods of intense legislative activity. Between September 4 and Election Day, 2004, over 100 roll call votes were taken in the United States House of Representatives. *See* http://clerk.house.gov/evs/2004/ROLL_500.asp (last visited November 7, 2005). The Senate took nearly 50 roll call votes. *See* http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm (last visited November 7, 2005). All of these votes were taken during the 60-day period prior to the election when electioneering communications were prohibited. The issues addressed in the legislation, including welfare reform, a constitutional amendment on marriage, tort reform, and Department of Defense and other agency appropriations, profoundly affect domestic public policy. At the critical point of passage, BCRA deprives organizations of an essential tool—broadcast media to urge members of the public to contact particular wavering legislators.[9]

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[9] The disproportionate legislative activity that occurs during the blackout periods imposed by BCRA is also evident from the numbers of bills enacted into law by the United States House of Representatives and Senate during election and non-election years: 300 in 2004 versus 198 in 2003; 241 in 2002 versus 136 in 2001. 149 Cong. Rec. D456 (daily ed. May 6, 2003) (Résumé of Congressional Activity—First Session of the One Hundred Seventh Congress); 149 Cong. Rec. D457 (daily ed. May 6, 2003) (Résumé of Congressional Activity—Second Session of the One Hundred Seventh Congress); 151 Cong. Rec. D96 (daily ed. February 15, 2005) (Résumé of Congressional Activity—First Session of the One Hundred Eighth Congress; 151 Cong. Rec. D97 (daily ed. February 15, 2005) (Résumé of Congressional Activity—Second Session of the One Hundred Eighth Congress).

In the context of PSAs, the decision of when to air the PSA—and avoid a BCRA violation—may not even be in the hands of the organizations producing the ads: PSAs are usually produced and distributed by charitable and other organizations, but when they are aired is typically at the discretion of individual broadcasters. Many PSAs have no set "shelf life," and could be broadcast many months or years after they are distributed, without the control or even knowledge of the nonprofit that created and disseminated the ad. *See, e.g.*, Comments of the American Cancer Society to the FEC on the Proposed Rules Regarding Electioneering Communications (Notice 2005-20) (September 30, 2005) at 2, *at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/comm_9.pdf ("ACS creates a PSA, and sends it to media outlets. *ACS does not retain control over whether and if a PSA is then used or discarded.*" (emphasis in original)).

Thus, as noted above, the American Cancer Society PSA recorded by Congressman Tim Bishop highlighting October as National Breast Cancer month could very well air in October 2006 as Congressman Bishop again goes before the voters. If so, the ad would violate BCRA's mechanical definition of electioneering communications. Without resolution of the constitutional issues presented in this case, the American Cancer Society and other nonprofit organizations may be well advised to forego constitutionality protected speech by no longer asking federal officeholders to appear in PSAs.[10]

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[10] Even ceasing to use federal officeholders in PSAs does not completely eliminate the risk of a BCRA violation. As prominent people from other spheres of life enter politics, an organization could run a risk asking celebrities or community leaders who are not currently officeholders to appear in their PSAs lest these individuals later decide to seek federal office. The American Cancer Society comments discuss a print advertisement in which then First Lady Hillary Clinton appeared urging individuals to get colorectal cancer screening, an advertisement that was then unearthed and reprinted by the *New York Post* during Mrs. Clinton's cam-

Absent relief from this Court, the likelihood is that most organizations will simply decide not to produce or air these broadcast communications during the blackout periods, despite the desire and need to do so. Few organizations are like Appellant in having both the doggedness and the resources necessary to sustain an as-applied challenge to the statute. Some will, but prudence would urge other groups to remain silent. Their speech would be effectively cut off and their ability to make broadcast communications restricted by BCRA's blunt tool.[11]

Both to prevent this possible chilling of protected speech and to avoid burdening the courts with unnecessary as-applied challenges, *Amicus* urges the Court in this case to hold that BCRA's definition of electioneering communications is unconstitutionally overbroad as applied to communications such as those presented by Appellant and those in the examples presented here. Resolution of the issues raised by the as-applied challenge in this case will provide guidance to organizations communicating in the public arena about the scope of their constitutionally protected speech

III. BCRA's Restrictions On Broadcast Communications Are Unconstitutional As Applied To Communications Funded Solely By Individuals And Aired By Organizations Not Formed Primarily For Commercial Or Economic Purposes.

Appellant has indicated that it is a "nonprofit, nonstock, ideological" corporation, and it indicates that it was willing to

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paign for the U.S. Senate. The same issue could easily arise in the context of the broadcast communications that BCRA regulates.

[11] Appellee will argue that the restrictions on electioneering communications are not a ban but rather a requirement that such communications not be made with funds from corporations or unions. The burdens discussed in more detail below make this an effective ban on such speech by many organizations.

run the ads in question here "with money from a 'segregated bank account' [containing] only donations from qualified individuals." Jurisdictional Statement at 6. The law's compelling governmental interest in preventing the corruption or possibility of corruption created by the amassed power of corporate wealth cannot be linked to a prohibition on electioneering communications to such an organization airing broadcasts using only such funds. Accordingly, this Court should find that BCRA's restrictions on electioneering communications are unconstitutionally broad as applied to these communications.

A. Using individual funds prevents corporate corruption.

Historically, the rights of individuals have been favored over the rights of corporations and unions because the Court has held that individual expenditures pose less risk of corrupting the political system. For example, in *Buckley*, the Court found that Congress may not constitutionally limit independent expenditures by individuals, even for communications that constitute "express advocacy" for or against a candidate. 424 U.S. at 45-51. The Court found a strong constitutional interest in protecting such speech and held that it did not create a sufficient threat of corruption to justify the attempted statutory restriction.

It is not clear why this preference for electoral spending by individuals should be any less powerful in groups of individuals. Yet, extending BCRA's restriction on electioneering communications to accounts comprised of funds solely from individuals would prohibit a group of individuals from joining together to say what one wealthy individual could say alone.

Furthermore, the restrictions on aggregating individual funds through corporations and unions, as opposed to other forms, seems a victory of form over substance. BCRA per-

mits a partnership, a trust, or other unincorporated entity to use funds derived solely from individuals to pay for electioneering communications. *See* BCRA § 203, 2 U.S.C. § 441b.

If, as discussed below, the Court believes that the political expenditures of corporations and unions pose a greater threat of corruption to the political system than those of individuals, then requiring that the funds used to pay for electioneering communications derive from individuals will address this concern. *Amicus* is not suggesting that the organization eschew all corporate and union funds but only that it pay for electioneering communications from a segregated account comprised solely of funds from individuals. No corporation (even a non-commercial organization such as Appellant) would be able to act as a conduit to spend otherwise prohibited corporate or union funds for electioneering communications. *See MCFL*, 479 U.S. at 262 (noting this issue and ruling that disclosure requirements were sufficient to address it; here Appellant offers to meet a higher standard of protection).

B. Corporate money's power to corrupt the political process is largely absent when the corporation is not formed for commercial or economic purposes.

Not all corporations are the same in their potential to skew the political process through the exercise of corporate wealth amassed for business purposes. As noted above, the Court distinguished Massachusetts Citizens for Life because it "was formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259. In *MCFL*, the Court noted that "[i]ndividuals who contribute to [an organization such as Massachusetts Citizens for Life] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes." *Id.* at 260-61. The Court rejected outright the idea that the concerns that justified

restrictions on other corporate speech were at all present for such an organization:

> It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. *Id.* at 263.

This same rationale applies to any organization not formed primarily for commercial or economic purposes. The individuals providing the organization with funds are not misled about the organization's purposes. The donor to the voluntary, nonprofit organization gives with a full understanding of and support for the organization's mission.[12]

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[12] *Amicus* notes that there may be a similar distinction to be drawn between the unions and for-profit corporations. In its consideration of the constitutionality of election laws, this Court has followed the statutory scheme set forth by Congress in treating unions and business corporations in a similar manner. However Congress may have made that choice based on politics rather than constitutional imperatives, seeking passage of legislation by balancing the competing interests of management and labor. Seen through the constitutional lens, there are cognizable differences between business corporations and unions that justify greater protection for union political activity. In many respects, unions are more like the voluntary associations discussed in *MCFL* than they are like business corporations. As this Court noted in *Austin*:

> [L]abor unions differ from corporations in that union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities. Although a union and an employer may require that all bargaining unit employees become union members, a union may not compel those employees to support financially "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the

Despite the Court's guidance that voluntary nonprofit organizations are due more constitutional deference, Appellee asserts that the bright-line nature of the electioneering communications definition is a sufficient purpose standing alone to uphold the statute against all as-applied challenges, even in the absence of any possibility for systemic corruption. Motion to Dismiss at 17. However, this Court in *MCFL* instructed the FEC that when "the rationale for restricting core political speech . . . is simply the desire for a bright-line rule[, it] hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263. The FEC's already rejected argument falls especially flat when, as here, equally bright-line tests that are not unconstitutionally overbroad are available.

C. Requiring Appellant to create a new form of entity is overly burdensome and thus not "necessary" even if a compelling governmental interest could be identified.

Appellee has argued that Appellant could create a political committee in order to air communications such as those at issue in this case, and Appellee will no doubt also argue that Appellant is free to become or create an *MCFL* organization to broadcast these messages. As the discussion above shows, because the government cannot show a threat of corruption for non-commercial/non-economic organizations that use funds derived from individuals, there is no constitutional basis for the government to restrict speech in this way. In addition, the requirement is more burdensome than necessary to achieve any compelling governmental interest that may exist.

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funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury. *Austin*, 494 U.S. at 665-66 (citations omitted).

The burdens of creating a federal political committee are significant. Chief among these is the contribution limit of $5,000 per donor, an amount that has remained unchanged since it was first imposed in 1976, resulting in a substantial reduction in the real buying power of those funds due to inflation. In addition, there are the detailed recordkeeping and reporting requirements acknowledged by this Court as burdensome in *MCFL*. *MCFL*, 479 U.S. at 253-56.[13] Finally there are some organizations that perceive political committees as somehow too much a part of the "sordid" political process, and many organizations would rather forego the opportunity to air broadcast advertisements rather than create an affiliated political committee.

Unlike requiring a 501(c)(3) organization to form a 501(c)(4) lobbying affiliate, as suggested in the Court's holding in *Regan v. Taxation with Representation of Washington*, establishing a federal political committee presents a considerable burden. 461 U.S. 540 (1983). The court emphasized in *Regan* that a 501(c)(3) organization was not denied the right to engage in lobbying activities because establishing a 501(c)(4) affiliate "requires *only* that the two groups are separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Id.* at 544 n. 6 (emphasis added). A corporation, whether organized under I.R.C. Section 501(c)(3) or 501(c)(4), requires substantially the same recordkeeping and reporting, and the Court did not find that dual structure overly burdensome. However, the process of registering and operating in compliance with registration, recordkeeping and reporting requirements of the Federal Election Campaign Act is vastly more complicated. Making this burden a requirement for

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[13] The district court in this case suggested that Appellant could create a political committee despite the explicit warning from this Court in MCFL against requiring the creation of a political committee to engage in constitutionally protected speech. Mem. Op. 7.

running broadcast lobbying communications presents an undue hardship.

Indeed some organizations—those operating under Section 501(c)(3) of the tax code—may be reluctant to create an affiliated political committee to avoid a perceived risk to the organization's tax-exempt status. Many 501(c)(3)s may be justifiably concerned that creating a political committee registered with the FEC suggests impermissible campaign intervention that would jeopardize their tax-exempt status.

Amicus takes the position that it would be permissible under the federal tax code, for a 501(c)(3) public charity to create a political committee if that committee was used solely for 501(c)(3)-permissible purposes, such as airing the broadcast ads featuring federal candidates described above. Even if they were willing to undertake the burdens discussed above, however, many 501(c)(3)s would likely choose to avoid the perceived risk of this uncharted legal territory and not create a political committee. If a political committee is the vehicle required to air these broadcast ads, most 501(c)(3)s would simply not air them.

The burdens of operating as an *MCFL* organization are likewise significant. In the wake of this Court's ruling in *MCFL*, Appellee FEC promulgated a regulation, 11 C.F.R. § 114.10, that sets out the standards the FEC will apply in determining whether an organization qualifies as a so-called "qualified nonprofit corporation."[14] The regulation requires

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[14] Alliance for Justice notes that the FEC's requirements under Section 114.10 are more restrictive than this Court's ruling in *MCFL* and subsequent cases in significant ways. For example, the regulation requires that the organization qualify as exempt from federal income tax under IRC Section 501(c)(4), a requirement nowhere stated in *MCFL*; and the regulation forbids the "qualified nonprofit" from receiving even an insignificant amount of funding from a business corporation, a position rejected by all of the Circuit Courts that have addressed the issue. James Bopp, Jr. & Richard E. Coleson, *The First Amendment is Still Not a Loophole: Exam-*

that the organization refrain from even incidental business activities, such as sales of advertising in publications or licensing the use of its name. The organization must not offer its members any benefits such as insurance or group purchasing programs that might serve as a disincentive from leaving the organization. The organization must eschew all (or perhaps all but a *de minimis* amount of—see note 14, *supra*) corporate or union funding.

Amicus created a sister 501(c)(4) organization—Alliance for Justice Action Campaign—several years ago. At the time the organization gave serious discussion to operating as an *MCFL* organization. Ultimately the burdens of complying with the restrictions led Alliance for Justice Action Campaign to operate as a more traditional 501(c)(4). Other organizations have made the same choice for the same reasons.

The standard *Amicus* proposes above—permitting non-commercial organizations to broadcast electioneering communications using individual funds—is both effective and substantially less burdensome than BCRA's restrictions on the funds that may be used to pay for these communications. Thus, even if this Court were to find a compelling governmental interest in applying BCRA's electioneering communications restrictions to Appellant, the statute would still be overbroad under a strict scrutiny analysis for its failure to narrow its restriction on speech to the constitutionally required minimum.

For the failure to state a compelling governmental interest and the failure to limit the restriction to only that which is necessary, this Court should find that BCRA's electioneering communications provisions are unconstitutionally overbroad as applied to broadcast communications funded solely by

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ining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy, 31 N. Ky. L. Rev. 289, 322 n.174 (2004) (citations omitted).

individuals and aired by organizations not formed primarily for commercial or economic purposes.

IV. BCRA's Restrictions On Broadcast Communications Are Also Unconstitutional As Applied To Communications Aired By Organizations Exempt From Federal Income Tax Under IRC Section 501(c)(3).

Because of the unique requirement imposed by their tax-exempt status, as discussed in more detail in Brief of OMB Watch, *et al.*, as *Amici Curiae* in Support of Appellant, there is no rational governmental interest in restricting the use of 501(c)(3) treasury funds for broadcast ads that identify a federal candidate. Alliance for Justice supports these *Amici*. Whether or not this Court issues a ruling to protect the communications described in Section III of this brief, any ruling by this Court should not encumber the constitutional right of 501(c)(3) organizations to be free of BCRA's restrictions on electioneering communications.

Alliance for Justice does feel obliged to comment on fears of the threat posed by those who would exploit a 501(c)(3) exemption to engage in partisan activities forbidden to other corporations under BCRA. It is worth noting that there has been no evidence of such problems, despite the fact that there currently is a regulatory 501(c)(3) exemption from BCRA's electioneering communications restrictions in effect (an exemption that now, unfortunately, is in serious jeopardy).[15]

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[15] The regulation, which *Amici* Alliance for Justice and OMB Watch, among others, had sought in the rulemaking process, was successfully challenged in court on procedural grounds, but the court allowed the regulation to stand while the FEC conducted a new rulemaking. *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005). The FEC is now questioning whether it may promulgate a new rule to retain the exception. Electioneering Communications (Notice 2005-20), 70 Fed. Reg. 49,508 (Aug. 24, 2005).

11 C.F.R. § 100.29(c)(6). Furthermore, any restriction that sought to regulate the speech of all 501(c)(3)s in an attempt to control a small minority of scofflaws would surely be a prime candidate for a constitutional challenge based on overbreadth.

V. BCRA's Restrictions On Broadcast Communications Are Also Unconstitutional As Applied To Communications Funded Solely By Individuals And Where The Content Of The Communication Concerns A Specific Legislative Or Administrative Policy Proposal.

As discussed above, paying for electioneering communications solely with funds from individuals largely eliminates the threat of corruption that this Court has found to justify government restrictions on speech under BCRA and federal election law more generally. When a broadcast communication concerns a matter of public policy, the willingness of any union or corporation to rely solely on funds from individuals should prevent the application of BCRA's electioneering communications restrictions.

McIntyre v. Ohio Election Comm., 514 U.S. 334, 346 (1995), was indicative of this Court's vigilance in protecting communications concerning matters of public policy when it said that speech on public policy "occupies the core of the protection afforded by the First Amendment." Nor is *McIntyre* alone:

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).
>
> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was

> to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).
>
> There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citations omitted).

Not only the First Amendment right to speak but also the right to associate is tied to matters of public policy:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).
>
> "[F]reedom to associate with others for the common advancement of political beliefs and ideas is a[n] activity protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (citations omitted).

As recently as *McConnell*, this court upheld BCRA's electioneering communications restrictions against a facial challenge but acknowledged that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 208 n. 88.

So close to the heart of the First Amendment is speech on public policy issues that this Court has been willing to protect the speech of corporations and unions on these issues to a greater degree than it has in the context of communications about candidates for office. Compare *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in which the Court struck down as unconstitutional a Massachusetts law prohibiting corporate expenditures to influence a ballot measure, with *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), in which the Court upheld a statute preventing

corporations (other than *MCFL* organizations) from making independent expenditures in state candidate elections. *See, Austin*, 494 U.S. at 675-76 (Brennan, J., concurring) (distinguishing *Bellotti* on this point) and *Id.* at 678 (Stevens, J., concurring) (also distinguishing *Bellotti*: "there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other").

The test that Appellant proposes to protect its broadcast communications on public policy issues (Jurisdictional Statement at 28) is too narrow. Although the proposed test would permit Appellant to air the ads in this case, the test's general application would unnecessarily chill protected speech by other organizations. In particular, *Amicus* objects to the test's requirement that "the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter" and the prohibition on mentioning "the candidate's record or position on any issue." There is no justification for restricting independent lobbying communications, yet referencing a targeted candidate's position on the issue in question is often necessary to the effectiveness of lobbying communications.[16]

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[16] Any test this Court may craft in ruling on this case must be careful to avoid unconstitutional vagueness or overbreadth. Government efforts to regulate speech must be based on clearly defined standards. *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976). A test that requires those seeking to speak on public policy issues to comply with numerous, sometimes subjective, criteria would necessarily be unconstitutionally overbroad and vague. For example, a requirement that communications concern an issue on which an organization has a longstanding interest would effectively ban such communications by organizations newly formed in response to the policy matter at issue. A requirement that the communications run outside BCRA's blackout periods ignores both the limited resources of organizations and the reality, discussed above, that

In light of this recognition of the importance of speech on public policy issues, no restriction on such speech can withstand strict scrutiny under the First Amendment. This Court has not found sufficient justification for allowing restrictions of corporate or union communications on policy issues, and as discussed in detail above, the use of individual funds is a further safeguard for the system. As a result, there is no compelling governmental interest in restricting broadcast communications on legislative or administrative policy proposals and supported solely with individual funds, and this Court should declare BCRA unconstitutionally overbroad as applied to such broadcast communications.[17]

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some public policy issues are only under consideration during those periods. A requirement that communications subject to heightened constitutional protection not "promote, support, attack, or oppose" a candidate offers no guidance to an organization as to whether it may air a broadcast message during a lobbying effort that criticizes the stance taken on the policy issue by an incumbent legislator.

[17] There are compelling arguments that First Amendment protections for communications on public policy issues are so great that BCRA is unconstitutionally overbroad with regard to all such communications and that corporations and unions should be allowed to spend general treasury funds for such broadcast messages. However, Appellant's willingness to use only funds from individuals to pay for its ads would allow this Court to rule for Appellant even absent such a determination.

CONCLUSION

For the reasons discussed above, *Amicus* urges the Court to find in favor of Appellant's as-applied challenge to BCRA's restrictions on broadcast communications and to craft a rule that guides other organizations that might likewise be unconstitutionally burdened with application of this statute.

Respectfully submitted,

RUTH EISENBERG *
JOHN POMERANZ
HARMON, CURRAN, SPIELBERG & EISENBERG, LLP
1726 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 328-3500

B. HOLLY SCHADLER
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009
(202) 328-1666

* Counsel of Record

Counsel for Amicus Curiae